



Bankruptcy and the Capital Market Phase 2

The Egypt Capital Markets Development Project



CHEMONICS INTERNATIONAL INC.



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BANKRUPTCY AND THE CAPITAL MARKET PHASE TWO

Introduction

Misc for Clearing, Settlement, and Depository (MCSD) and the Capital Markets Development (CMD) project, under Phase Two of our task on the Egyptian Bankruptcy Law, worked with market representatives in October 2000 to determine ways of resolving bankruptcy provisions conflicting with the new Central Securities Depository Law (Law 93/2000). The recommendations are designed to enabling those conducive to the reduction of settlement risk to prevail.

Participants of a March 29, 2001 workshop had already identified these conflicting provisions, where potential and the real problems posed by those provisions were raised with industry representatives. Subsequent to that workshop, a report was prepared summarizing our assessment and conclusions.

These efforts are governed by specific clearing and settlement standards. In 1993, the Group of Thirty on Clearing and Settlement (G-30) and the Bank for International Settlements (BIS) identified categories of risk pertaining to the clearance and settlement of securities transactions. In Egypt, MCSD, the national central securities clearing and settlement organization, is mandated by the Capital Market Law (Law 95/1992) and the Central Securities Depository and Registry Law to identify and manage such risks for the benefit of the capital market.

Central depositories must address legal risk, which is the risk that the risk containment mechanisms used to guarantee the settlement of trades will not be enforced because of conflicts with other laws. Many of those laws do not account for the needs of the capital market. In Egypt, these risk containment mechanisms are mandated by the Capital Market Law, the Central Securities Depository and Registry Law, and MCSD's master contract and rules, which were approved by the CMA. Legal risk is also the risk that unclear legal and regulatory provisions will create uncertainty, leading to misinterpretation and litigation.

An important source of legal risk resides in the bankruptcy law because its provisions do not harmonize and have not been amended to accommodate the needs and requirements of the capital market.

I. Key Settlement Standards

It is a widely acknowledged standard that all trades must settle on the due date. This standard applies, by virtue of the new Central Securities Depository and Registry Law, to MCSD who has been given the responsibility to ensure that a trade will settle notwithstanding the failure of a financial institution or its client. If trade does not settle, investors will lose confidence in the Egyptian stock exchange, the capital market, and their good reputation.

In addition, the failure to settle will lead to the failure of other participants – often referred to as the “domino effect” – and “systemic risk.”

Settlement Risk Containment: There are standard risk containment mechanisms utilized by depositories and settlement systems around the world that have become generally accepted as

best practices. MCSD does and should implement these best practices. The legal framework of the capital market must also enable MCSD to safely and surely implement them, without being at risk that they be invalidated by other laws. These practices are meant to provide MCSD the ability to fulfill its role mandated by the law: to ensure MCSD participants will settle all their trades, under any adverse situation.

A first and basic means of risk containment is the guarantee to MCSD that the collateral held by MCSD, and the right of MCSD to retain assets on deposit or standing to the credit of the defaulter, can be exercised in the event of participant insolvency or bankruptcy. This allows MCSD, as a secured or preferred creditor, to either sell those securities that MCSD paid for on behalf of the defaulting buyer and to utilize the buyer's Settlement Guarantee Fund (SGF) contribution, or to utilize the defaulter's contribution to fund the buy-in of the securities that the defaulter has not delivered and to utilize the sales funds received from the seller.

A second risk containment mechanism is the collection of contributions to the SGF. The amount of the guarantee collateral, in the form of participants' contributions, is calculated pursuant to a CMA approved formula and in accordance with a periodic assessment of the settlement risks posed by the market value of the participants' transactions.

A third risk containment is the use of "netting" and "novation." The legal concept of novation is twofold: to transform numerous contractual obligations (i.e. all the buy and sell trades done by a broker on that day) into a single newer and netted obligation ("netting"), and the substitution or replacement by a new party instead of the original seller and buyer participant (such as when the central depository becomes the counterparty in every trade). The new contract obligates and entitles the participant to deliver or receive a net amount of the various securities bought and sold, and to pay for or receive the net amount of the total purchases less the total sales on that given day.

A fourth risk remedy is to allow MCSD to suspend providing its clearing and settlement services to, or terminate its contract with, a participant upon its becoming insolvent or bankrupt.

Investor Asset Protection: Client assets held at a financial intermediary should not be used to pay creditors of the bankrupt participant and should be easily identified and kept in a separate client account so they can be returned to their client owners without delay.

II. Key Legal Provisions

The Central Securities Depository and Registry Law contains several provisions relevant to containing settlement risks. Article 52 instructs MCSD to complete the settlement transactions before the issuance of a bankruptcy judgment. It is unclear, however, how this provision applies prior to a participant being declared bankrupt.

Article 22 requires participants to enter into a contract with MCSD and to give a pledge to MCSD as a principal or on behalf of their clients. This article allows MCSD to use the pledge as collateral to cover the settlement obligations of the defaulter to a settlement.

III. Issues Related to Egyptian Bankruptcy Rules Issues

Bankruptcy could be initiated or declared after the customer's trade is executed when his securities or cash already are with the participant, but before the participant delivers the securities or cash to MCSD. In other instances, securities or cash may be in a MCSD account but transactions have not yet settled, or the customer may have placed an order but has yet to deliver the cash or securities to the participant.

Uncertain Bankruptcy Rules: Article 591 is a unique provision raising several questions. It reads that, "After the bankruptcy declaration ruling is pronounced, no clearing arrangements shall take place between the bankrupt's due rights and his obligations, unless a link connects them together. This linkage exists particularly if the rights and obligations arise from one reason, or a current account comprises them." While this seems to apparently allow MCSD to complete settlement, it permits the syndic (trustee in bankruptcy) to "cherry pick." This allows a trustee to choose which trades he will settle based on whether they are profitable or not.

Article 592 can also be construed as helpful to the capital market laws and regulations. It provides that the bankrupt property shall not comprise property owned by other than the bankrupt. However, this does not constitute enough support to argue that customer property is safe from the syndic.

Conflicting Bankruptcy Rules: There are several provisions in the Egyptian bankruptcy rules that are not consistent with capital market laws and regulations.

Article 643 permits the sale of assets of the bankrupt. There is a serious concern that assets of the bankrupt broker many include client assets. The bankruptcy judge permits selling the bankrupt's property if the sale is necessary to obtain money for spending on the bankrupt's affairs, or if the sale will realize positive benefit to the creditors of the bankrupt.

The rules do not protect the contributions made by the broker to the SGF or MCSD and they also permit the syndic of the bankruptcy not to fulfill all trading contracts, thereby allowing "cherry picking." These are in violation of the standard that all trades must be settled.

Article 623 provides that bankruptcy declaration rulings shall not result in rescinding the contracts that bind the two sides, and to which the bankrupt is party, unless they were based on personal considerations. However, the article also provides that if the bankruptcy trustee does not execute the contract, or does not continue its execution, the other party may demand its rescission. All decisions the bankruptcy trustee takes concerning the contract shall be brought before the bankruptcy judge to permit them.

Under certain circumstances, the bankrupt broker could continue operating business. This questions the applicability of Article 645.

Article 590 provides that a bankrupt broker shall not settle his debts or receive his due rights.

Articles 616 and 618 provide for certain creditors to have priority over customers in the bankruptcy, such as for taxes and wages, while article 635 permits a bankruptcy judge to allow money necessary for spending on the urgent matters. Article 596 permits the bankruptcy judge to determine an allowance for the bankrupt to be paid from the bankruptcy funds.

Article 594 provides that no court action shall be taken against the bankrupt, nor shall steps be followed therefore with the exception of the following: The actions connected with the property and dispositions not included in the bankruptcy. This raises an issue as to whether MCSD can complete transactions to settle.

Article 605 provides that ordinary creditors or the general lien creditors shall not, after the court bankruptcy, institute individual cases against the bankruptcy, nor take any judiciary procedures against it. The issue of a bankruptcy declaration ruling shall result in discontinuing the individual cases brought by the creditors and staying the execution of proceedings that these creditors began before the bankruptcy declaration ruling was issued.

IV. IOSCO and Some G-30 Compliant Model Provisions

Numerous countries are faced with the same bankruptcy problems adversely affecting their capital markets. The draft clauses below are excerpted from North American and other laws adopted to harmonize bankruptcy legislation with the capital market legal framework.

These provisions illustrate how clear and specific the legislator has been to safely ensure that bankruptcy will not adversely affect the clearing and settlement process and the use of risk containment mechanisms at the disposal of the central clearing house. The practical result is that a trustee (syndic) in bankruptcy in these countries would not even litigate or challenge in a court of justice the right of the depository to use any of the risk containment measures at its disposal in order to complete settlement.

Issue 1: The trades will settle despite bankruptcy

“The filing of a petition does not operate as a stay of the settlement clearing agency to settle securities contracts.” Section 362 of the U.S. Bankruptcy Law.

“The exercise of a contractual right of a stockbroker or securities clearing agency to cause the liquidation of a securities contract shall not be stayed, avoided or otherwise limited by operation of any provision of the Bankruptcy Law.” Section 555 of the U.S. Bankruptcy Law.

“The trustee shall promptly discharge all obligations of the debtor to a customer relating to securities or cash by delivery of securities or the making the payments to or for the account of such customer.” Section 78fff-2 of Securities Investor Protection Act.

“The trustee shall, to the extent that securities can be purchased in a fair and orderly market, purchase securities as necessary for the delivery of securities to the customer.” Section 78fff-2(d) of Securities Investor Protection Act.

Issue 2: SGF contributions are protected

Contributions of participants to the SGF pursuant to the rules of MCSD cannot be considered preferential payments or fraudulent preferences over other creditors.

“The trustee may transfer an interest of the debtor in property that was incurred on or within one year before the filing of the bankruptcy if the bankrupt received less than a reasonably equivalent value in exchange for such transfer. For purposes of the bankruptcy law, a stock broker or securities clearing agency that receives settlement payment takes for value to the extent of such payment.” Section 548 of the U. S. Bankruptcy Law.

“The trustee may not avoid transfer if in payment of debt incurred by debtor in the ordinary course of business or financial affairs of the debtor and the transferee, made in the ordinary course of business or financial affairs of the debtor and the transferee, and made according to ordinary business terms.” Section 547 of the U.S. Bankruptcy law.

“Avoidance of preference does not apply in respect of a margin deposit made by a clearing member with a clearing house.” Section 95 of Canadian Bankruptcy Law.

“Margin deposit means a payment, deposit, or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions.” Section 96 Canadian Bankruptcy Law.

Issue 3: Customer property used to pay creditors

In Section 741 of the U.S. Bankruptcy Law, “customer name security” means security held for the account of a customer on the date of the filing of the petition; registered in such customer’s name on such date or in the process of being so registered under instructions from the debtor.

In addition, “customer property,” according to the U.S. Bankruptcy Law section 741, means “cash security or other property and proceeds of such cash security or property received acquired or held by or for the account of the debtor from or for the securities account of the customer including property that was unlawfully converted from and that is the lawful property of the estate.”

Section 751 provides, “The trustee shall deliver any customer name security to or on behalf of the customer entitled to such security.”

The purpose of a liquidation proceeding under SIPA shall be to deliver, “as promptly as possible after appointment of a trustee in such liquidation, customer name securities to or on behalf of the customers of the debtor and to distribute customer property and otherwise satisfy net equity claims of customers.” Section 78fff of SIPA.

“Trustee shall deliver securities to or on behalf of customers to the maximum extent practicable in satisfaction of customer claims for securities.” Section 78 ffff-1 of SIPA.

“Where a securities firm becomes bankrupt, securities owned by the securities firm and securities and cash held by or for the account of the securities firm or a customer, other than customer name securities, vest in the trustee.” Canadian Bankruptcy Law, section 261.

Issue 4: Bankrupt broker can not operate its business

“The purpose of a liquidation proceeding is to liquidate the business of the debtor.” Section 78fff of SIPA.

“It shall be unlawful for any broker or dealer for whom a trustee has been appointed to engage thereafter in business as a broker or dealer.” Section 78 jjj of SIPA.

Issue 5: Subrogation

A clearinghouse can be subrogated to its customer participants in a liquidation proceeding.

“The purpose of a liquidation proceeding shall be to enforce rights of subrogation.” Section 78fff of SIPA.

“If the registered clearing agency sustains a net loss on the close out of such contracts, they shall have the right to participate in the general estate as unsecured creditors to the extent of such loss.” Section 78 ffff-2 (e) of SIPA.

“SIPC shall be subrogated to the claims of such customers against the member.” Section 78 fff-4 of SIPA.

Issue 6: Netting

Netting gives the ability to the clearinghouse to reduce the debt of the bankrupt participant by the amount of the credit owed to it. Bankruptcy laws can prevent netting of a bankrupt broker’s debts and credit. As a result, the debtor must pay the broker, but the creditors of the broker only have a claim in bankruptcy.

A broker or dealer shall net all profits and losses on all contracts closed under section 78 fff-1(e) of SIPA.

This section, 118 of the Canadian Bankruptcy Law, provides that nothing in this law affects the rights of a party to a contract including an eligible financial contract with respect to set-off.

Issue 7: Termination of settlement services contract

Nothing in the bankruptcy law affects the rights of a party to a contract, including an eligible financial contract with respect to termination. Bankruptcy Law, section 118.

V. Proposed Amendments to Egypt Bankruptcy Rules

Given the uncertainties and possible conflicts presented above concerning the bankruptcy rules in Egypt, consideration of the following amendments are recommended.

1. Notwithstanding provision 643, any property of the customer of a bankrupt broker may not be used to settle debts of the bankrupt including taxes, wages, or administrative expenses of the syndic.
2. Syndic is not permitted to institute a lawsuit against SGF to recover payments made to SGF and MCSD that are for contributions or moneys to settle securities transactions.
3. Under no circumstances may the bankrupt broker or Syndic operate the business of the broker after the declaration of bankruptcy, other than for the orderly liquidation of the accounts and the broker.
4. Consistent with Article 52, neither the syndic, the bankrupt brokers, nor creditors of the bankrupt broker shall interfere with the settlement of transactions by MCSD.
5. To the extent a syndic shall close a securities transaction, he shall close all such transactions that have been netted.

6. Notwithstanding provisions of the Bankruptcy Law that provides any disposition of the property of a bankrupt after declaration of bankruptcy unless the court orders otherwise shall be void unless with the consent or ratification of the court, those provisions shall not apply to any disposition of deposited securities.
7. MCSD may terminate its agreement to clear or settle securities transactions or to act as a depository for securities, with an insolvent participant or with a participant in respect of which bankruptcy proceedings are taken, whether such proceedings are voluntary or involuntary.
8. Upon terminating its agreement to clear or settle securities transactions or to act as a depository for securities between the insolvent participant and MCSD, and if on termination there is a net termination sum owed to MCSD by the insolvent participant, MCSD shall be deemed to be a creditor of the insolvent participant in respect of that net termination sum.
9. MCSD may, notwithstanding any other provisions, realize assets of the insolvent pursuant to a pledge in favor of the MCSD.

Without such amendments, the Egyptian securities settlement system may not possess a well-founded, clear, and transparent legal basis. This would fail to meet the recommendations of theG-30, reiterated by the 2001 joint report of BIS and the IOSCO, on how to build a better settlement structure.

APPENDIX A: WORKSHOP PARTICIPANTS AND AGENDA

MCSD Legal Workshop on Capital Market and Bankruptcy Issues

Date: Thursday, October 19, 2000

Time: from 9:30 am to 13:00 - lunch will be served

Place: CMD meeting room of the Capital Market Development Project

20, Aisha el Taimoriya, 2nd Floor – Garden City (tel: 795-0353)

Speaker: Marc E. Albert, Esq., and bankruptcy law practitioner

Morrison & Hecker, L.L.P Washington, DC.

Invitees:

Dr. Ziad Bahaa-El Din	Advisor to the Minister, Legal Affairs, MOE
Ashraf Shoukry	Legal Advisor, MOE
Sameh Abo Zaid	Legal Advisor, MOE
Abdel Azeem El Shehewi	CBE
Mohamed Gamal El Din	CBE
Nassrah Mahmoud Taha	CBE
Samia Abdel Wahab Turkey	CBE
Ahmed Sabri	Judge, National Center of Judicial Studies
Amr El Nokaly	Citibank
Hatem Badr	Citibank
Ali Aissia Aamr	ECMA
Mohamed Abdel Salam	MCSD
Ashraf El Kaadie	MCSD
Reda Farahat	MCSD
Ahmed Akram Helmi	MCSD

Reham Gamal Mahmoud	MCSD, (Operation)
Mohamed Kamal	CASE
Karim Adel Kamel	Adel Kamel Law Office
Raouf Kedwani	Int. Bank Misr America
Bassel Gamal Aly	CIB
Hesham Abdel Fattah	CIB
Rania Zayed	Fortune Financial Team
Assem Ragab	Fortune Financial Team
Mark Prothero	EBB
Omayma Youssry	EBB
Tamer Erfan	Al Ahly Real Estate Dev. Co
Gada Kortom	Shalakany Law Firm
Dr. Mohie El Dien Alam El Dien	Shalakany Law Firm
François Pépin	CMD
Michael Porter	CMD
Neffertiti Tosson	CMD

AGENDA

1. Purpose of this Workshop
2. Mandate
3. Key settlement provisions
4. Bankruptcy impact on the capital market
5. Egyptian law and the new Central Securities Depository and Registry Law
6. Laws that follow IOSCO and G- 30 recommendations
7. Draft provisions
8. Feedback discussion
9. Next steps

MCSD Legal Workshops



Capital Markets and Draft New Bankruptcy Legislation
19 Oct 2000

Key Settlement Provisions

- ◆ all trades must settle on settlement date
- ◆ contributions to the SGF are protected
- ◆ customer property is protected from creditor claims
- ◆ depository may terminate contracts with bankrupt brokers
- ◆ customer money and securities are returned to the customers
- ◆ substitute of depository for defaulting broker
- ◆ Netting of all profits and losses on contracts

Depository and Central Registry for Securities Law No. 93 of 2000:

Article 52

- ◆ In the event of bankruptcy of any central depository member (DCM), the company shall complete all transactions in which such member was a party before it was declared bankrupt. All such transactions shall be enforceable against all parties.
- ◆ The Authority may invalidate any or part of a transaction, on its own or at the request of the representative of the creditors (trustee - syndic) of the bankrupt Participant if the transaction is effected in misconduct.

Depository and Central Registry for Securities Law No. 93 of 2000:

Article 22

- ◆ A Participant shall execute a written agreement with the company, substantially in the form of the model agreement approved by the Capital Market Authority, provided that Participant is obliged to:
 - comply with the rules, systems and procedures of the company and modifications thereto made by the company, once approved by the Capital Market Authority.
 - pay the fees and expenses for the services provided by the company, and compensate the company for any violation of the rules, systems and procedures;
 - pledge the securities deposited at the company in his name and for its account whenever required by the company to guarantee the fulfillment of his obligations and to authorize the company to borrow money against the securities pledged;

Depository and Central Registry for Securities Law No. 93 of 2000:

Article 22 (continued)

- enable company representative to examine the service books and records of the company and verify their accuracy;
- abide by the decisions of the board of directors of the company concerning its services;
- contribute to the settlement guarantee fund of securities transactions; and
- share the loss incurred by the company pursuant to the rules adopted by the board of directors of the company and approved by the Capital Market Authority.
- The agreement shall include provisions on the resolution of disputes that may arise between a Participant and the company.

Egyptian Bankruptcy Law

Article 589

- ◆ 1. The mere issue of the bankruptcy declaration ruling shall fetter the hands of the bankrupt from managing and disposing of his property. The dispositions made by the bankrupt on the day the bankruptcy declaration ruling is issued shall be considered as made after issuing the ruling.
- ◆ 2. If the disposition is not to be used as evidence vis-a-vis third parties except by entry, registration, or other proceedings, it shall not apply to the group or creditors unless the proceeding took place before issuing the bankruptcy declaration ruling.
- ◆ 3. Fettering the bankrupt's hand from managing and disposing of his property and funds shall not prevent him from taking the necessary procedures toward maintaining and preserving his rights.

Egyptian Bankruptcy Law

Article 590

- ◆ 1. A bankrupt, after the bankruptcy declaration ruling is pronounced, shall not settle his debts, nor receive his due rights.
- ◆ 2. However, if the bankrupt holds a commercial paper, its value may be settled to him at its due date, unless the bankruptcy trustee objects to such settlement according to article 431 of this law.

Article 591

- ◆ After the bankruptcy declaration ruling is pronounced, no clearing arrangements shall take place between the bankrupt's due rights and his obligations unless a link connects them together. This linkage exists particularly if the rights and obligations arise from one reason, or a current account comprises them.

Egyptian Bankruptcy Law

Article 592

- ◆ 1. Hand binding shall comprise all property owned by the bankrupt on the day the bankruptcy declaration ruling is pronounced, and the property of which the ownership devolves to him while he is in a state of bankruptcy.
- ◆ 2. However, hand binding shall not comprise the following:
 - One- The property on which no attachment is legally permissible, and the allowance determined for the bankrupt.
 - Two- Property owned by other than the bankrupt.
 - Three- Rights connected with the person of the bankrupt or his personal status.
 - Four- Compensation payable to the beneficiary in a valid insurance policy concluded by the bankrupt before the issue of the bankruptcy declaration ruling. However, the beneficiary shall refund to the bankruptcy all insurance premiums the bankrupt paid from the date the court appoints to discontinue the payment, unless otherwise prescribed in the law.

Egyptian Bankruptcy Law

Article 594

- ◆ 1. After issuance of the bankruptcy declaration ruling, no court action shall be brought by or against the bankrupt, nor shall steps be followed therefor, with the exception of the following:
 - One- the actions connected with the property and dispositions not included in the hand binding.
 - Two- Actions related to the bankruptcy works that the law allows the bankrupt to carry out.
 - Three- Criminal actions.
- ◆ 2. The court may permit the involvement of the bankrupt in bankruptcy related actions. It may also allow the involvement of the creditor in these actions, if he has an interest therein.
- ◆ 3. If the bankrupt files or against him is filed a criminal action, or an action related to his person or his personal status, the bankruptcy trustee shall be involved therein, if it comprises financial claims.

US Liquidation Laws

Sec. 362. Automatic stay

- ◆ (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -
 - (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
 - (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
 - (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
 - (4) any act to create, perfect, or enforce any lien against property of the estate;

US Liquidation Laws

Sec. 362. Automatic stay (continued)

- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
 - (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
 - (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
 - (8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.
- ◆ (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay

US Liquidation Laws

Sec. 362. Automatic stay (continued)

- (6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

US Liquidation Laws

Sec. 546. Limitations on avoiding powers

- ◆ (a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of -
 - (1) the later of -
 - (A) 2 years after the entry of the order for relief; or
 - (B) year after the appointment or election of the first trustee under section 702, 1104, 1163, 1202, or 1302 of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or
 - (2) the time the case is closed or dismissed.

US Liquidation Laws

Sec. 546. Limitations on avoiding powers (continued)

- ◆ (e) Notwithstanding sections 544, 545, 547, 548(a)(1)(B), and 548(b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, made by or to a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency, that is made before the commencement of the case, except under section 548(a)(1)(A) of this title.

US Liquidation Laws

Sec. 547. Preferences

- ◆ (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made -

US Liquidation Laws

Sec. 547. Preferences (continued)

- (A) on or within 90 days before the date of the filing of the petition; or
- (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if -
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations

◆ (a)

- (1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -
 - (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations (continued)

- (B)
- (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
- (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations (continued)

- (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations (continued)

- ◆ (c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations (continued)

- ◆ (d)
 - (1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition

US Liquidation Laws

Sec. 548. Fraudulent transfers and obligations (continued)

- (B) a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency that receives a margin payment, as defined in section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment;

US Liquidation Laws

Sec. 555. Contractual right to liquidate a securities contract

The exercise of a contractual right of a stockbroker, financial institution, or securities clearing agency to cause the liquidation of a securities contract, as defined in section 741 of this title, because of a condition of the kind specified in section 365(e)(1) of this title shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by order of a court or administrative agency in any proceeding under this title unless such order is authorized under the provisions of the Securities Investor Protection Act of 1970 or any statute administered by the Securities and Exchange Commission. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a national securities exchange, a national securities association, or a securities clearing agency.

Canadian Liquidation Laws

R.S., c. B-3, s. 45.

◆ Certain rights limited

- 65.1 (1) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement with the insolvent person, or claim an accelerated payment under any agreement with the insolvent person, by reason only that
 - (a) the insolvent person is insolvent; or
 - (b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Idem

- (2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:
 - "(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of
 - (i) the notice of intention, if one was filed, or (ii) the proposal, if no notice of intention was filed."

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Idem

- (3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that
 - (a) the insolvent person is insolvent;
 - (b) a notice of intention or a proposal has been filed in respect of the insolvent person; or
 - (c) the insolvent person has not paid for services rendered, or material provided, before the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed.

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Certain acts not prevented

- (4) Nothing in subsections (1) to (3) shall be construed
 - (a) as prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the filing of
 - (i) the notice of intention, if one was filed, or
 - (ii) the proposal, if no notice of intention was filed; or
 - (b) as requiring the further advance of money or credit.

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Provisions of section override agreement

- ◆ (5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to subsections (1) to (3) is of no force or effect.

Powers of court

- ◆ (6) The court may, on application by a party to an agreement or by a public utility, declare that subsections (1) to (3) do not apply, or apply only to the extent declared by the court, where the applicant satisfies the court that the operation of those subsections would likely

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Eligible financial contracts

- ◆ (7) Subsection (1) does not apply
 - (a) in respect of an eligible financial contract; or
 - (b) to prevent a member of the Canadian Payments Association established by the Canadian Payments Association Act from ceasing to act as a clearing agent or group clearer for an insolvent person in accordance with that Act and the by-laws and rules of that Association.

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

Definitions

- ◆ (8) In subsections (7) and (9), "eligible financial contract" «contrat financier admissible» "eligible financial contract" means
 - (a) a currency or interest rate swap agreement,
 - (b) a basis swap agreement,
 - (c) a spot, future, forward or other foreign exchange agreement,
 - (d) a cap, collar or floor transaction,
 - (e) a commodity swap,
 - (f) a forward rate agreement,
 - (g) a repurchase or reverse repurchase agreement,

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

- (h) a spot, future, forward or other commodity contract
- (i) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,
- (j) any derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in paragraphs (a) to (i),
- (k) any master agreement in respect of any agreement or contract referred to in paragraphs (a) to (j), (k.1) any master agreement in respect of a master agreement referred to in paragraph (k),
- (l) a guarantee of the liabilities under an agreement or contract referred to in paragraphs (a) to (k.1), or

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

- (m) any agreement of a kind prescribed; "net termination value" «valeurs nettes dues à la date de résiliation» "net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.

Application of paragraphs 69(1)(a) and 69.1(1)(a)

- ◆ (9) For greater certainty, where an eligible financial contract entered into before the filing in respect of an insolvent person of

Canadian Liquidation Laws

R.S., c. B-3, s. 72.

Avoidance of preference in certain cases

- ◆ 95. (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any insolvent person in favour of any creditor or of any person in trust for any creditor with a view to giving that creditor a preference over the other creditors is, where it is made, incurred, taken or suffered within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date the insolvent person became bankrupt, both dates included, deemed fraudulent and void as against the trustee in the bankruptcy.

Canadian Liquidation Laws

R.S., c. B-3, s. 72. (continued)

When view to prefer presumed

- ◆ (2) Where any conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in subsection (1) has the effect of giving any creditor a preference over other creditors, or over any one or more of them, it shall be presumed, in the absence of evidence to the contrary, to have been made, incurred, taken, paid or suffered with a view to giving the creditor a preference over other creditors, whether or not it was made voluntarily or under pressure and evidence of pressure shall not be admissible to support the transaction.

Canadian Liquidation Laws

R.S., c. B-3, s. 72. (continued)

Exception

- ◆ (2.1) Subsection (2) does not apply in respect of a margin deposit made by a clearing member with a clearing house.

Definitions

- ◆ (3) In this section, "clearing house" «chambre de compensation» "clearing house" means a body that acts as an intermediary for its clearing members in effecting securities transactions;
- ◆ "clearing member" «membre» "clearing member" means a person engaged in the business of effecting securities

Canadian Liquidation Laws

R.S., c. B-3, s. 72. (continued)

- ◆ "creditor" «créancier» "creditor" includes a surety or guarantor for the debt due to the creditor;
- ◆ "margin deposit" «dépôt de couverture» "margin deposit" means a payment, deposit or transfer to a clearing house under the rules of the clearing house to assure the performance of the obligations of a clearing member in connection with security transactions, including, without
- ◆ limiting the generality of the foregoing, transactions respecting futures, options or other derivatives or to fulfil any of those obligations.

Canadian Liquidation Laws

R.S., 1985, c. B-3, s. 95; 1997, c. 12, s. 78.

Extended period

- ◆ 96. Where the conveyance, transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

Canadian Liquidation Laws

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79.

Protected transactions

- ◆ 97. (1) No payment, delivery, conveyance, transfer, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting settlements, preferences and reviewable transactions:

Canadian Liquidation Laws

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79. (continued)

- (a) a payment by the bankrupt to any of the bankrupt's creditors;
- (b) a payment or delivery to the bankrupt;
- (c) a conveyance or transfer by the bankrupt for adequate valuable consideration; and
- (d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

Canadian Liquidation Laws

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79. (continued)

Definition of "adequate valuable consideration"

- ◆ (2) The expression "adequate valuable consideration" in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property conveyed, assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

Canadian Liquidation Laws

R.S., 1985, c. B-3, s. 96; 1997, c. 12, s. 79. (continued)

Law of set-off to apply

- ◆ (3) The law of set-off applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off is affected by the provisions of this Act respecting frauds or fraudulent preferences.

Canadian Liquidation Laws

R.S., c. B-3, s. 45. (continued)

- (a) a notice of intention, or
- (b) a proposal, where no notice of intention was filed, is terminated on or after that filing, the setting off of obligations between the insolvent person and the other parties to the eligible financial contract, in accordance with its provisions, shall be permitted, and if net termination values determined in accordance with the eligible financial contract are owed by the insolvent person to another party to the eligible financial contract, that other party shall be deemed, for the purposes of paragraphs 69(1)(a) and 69.1(1)(a), to be a creditor of the insolvent person with a claim provable in bankruptcy in respect of those net termination values.

Canadian Payment Clearing and Settlement Act

- ◆ 8. (1) Notwithstanding anything in any statute or other law of Canada or a province,
 - (a) the settlement rules of a designated clearing and settlement system are valid and are binding on the clearing house, the participants, a central counter-party and the Bank and any action may be taken or payment made in accordance with the settlement rules;

Canadian Payment Clearing and Settlement Act

(continued)

- (b) the obligation of a participant, a clearing house or a central counter-party to make payment to a participant and the right of a participant, a clearing house or a central counter-party to receive payment from a participant, a clearing house or a central counter-party shall be netted and a net settlement or close-out amount shall be determined in accordance with the settlement rules, if they so provide; and

Canadian Payment Clearing and Settlement Act

(continued)

- (c) where the settlement rules of a designated clearing and settlement system provide that the settlement of a payment obligation through an entry to or a payment out of an account of a participant, a clearing house or a central counter-party at the Bank is final and irrevocable, the entry or payment shall not be required to be reversed, repaid or set aside.

◆ Payments not subject to set aside provisions

◆ (2) An entry to or a payment out of the account

of a participant, a clearing

Canadian Payment Clearing and Settlement Act

(continued)

Payments not subject to set aside provisions

- ◆ (2) An entry to or a payment out of the account of a participant, a clearing house or a central counter-party at the Bank to settle a payment obligation in a designated clearing and settlement system shall not be the subject of any provision or order that operates as a stay of that activity.

Canadian Payment Clearing and Settlement Act

(continued)

Rights, etc., not subject to stay

- ◆ (3) The rights and remedies of a participant, a clearing house, a central counter-party or the Bank in respect of collateral granted to it as security for a payment or the performance of an obligation incurred in a designated clearing and settlement system may not be the subject of any stay provision or order affecting the ability of creditors to exercise rights and remedies with respect to the collateral.

Canadian Payment Clearing and Settlement Act

(continued)

Netting Agreements

Termination

- ◆ 13. (1) Notwithstanding anything in any law relating to bankruptcy or insolvency or any order of a court made pursuant to an administration of a reorganization, arrangement or receivership involving insolvency, where a financial institution or the Bank is a party to a netting agreement, the financial institution or the Bank may terminate the agreement and determine a net termination value or net settlement amount in accordance with the provisions of the agreement and the party entitled to the net termination value or settlement amount is to be a creditor of the party owing the net termination value or net settlement amount for that value or amount.

Canadian Payment Clearing and Settlement Act

(continued)

Interpretation

"net termination value" « reliquat net»

- ◆ "net termination value" means the net amount obtained after setting off or otherwise netting the obligations between the parties to a netting agreement in accordance with its provisions;

Canadian Payment Clearing and Settlement Act

(continued)

"netting agreement" «accord de compensation»

- ◆ "netting agreement" means an agreement between two or more financial institutions or between the Bank and one or more financial institutions that is
 - (a) an eligible financial contract within the meaning of section 22.1 of the Winding-up and Restructuring Act, or
 - (b) an agreement that provides for the netting or set-off of present or future obligations to make payments against the present or future rights to receive payments.

Bankruptcy Provisions of Mauritius

14. Non-application of provisions of bankruptcy and company liquidation

(1) Subject to subsection (2), where by virtue of the provisions of the Companies Act or the Bankruptcy Act or any other enactment in relation to bankruptcy or company liquidation it is provided that -

(a) any disposition of the property of a company after commencement of a winding up shall be void, unless the Court orders otherwise; or

(b) any disposition of the property of a person who is adjudged bankrupt after presentation of the petition for a bankruptcy order and before vesting of the bankrupt's estate in the Official Receiver shall be void unless done with the consent or ratification of the Court, those provisions shall not apply to any disposition of deposited securities.

(2) Where the Court is satisfied that a party to the disposition, being a party other than the CDS, had notice that a petition had been presented for the winding up or bankruptcy of the other party to the disposition, it may award damages against that party on such terms as it thinks equitable or make such other order as the Court thinks fit, including an order for the transfer of deposited securities by that party but not an order for the rectification of the Depository Register.

Bankruptcy Provisions of Mauritius

(continued)

15. Set-off

(1) The CDS may terminate its agreement to clear or settle securities transactions or to act as a depository for securities, with an insolvent participant or with a participant in respect of which insolvency or bankruptcy proceedings are taken, whether such proceedings are voluntary or involuntary.

(2) Upon terminating its agreement under subsection (1), the CDS may set off obligations between the insolvent participant and the CDS, in accordance with the provisions of the agreement, and if on termination there is a net termination sum owed to the CDS by the insolvent participant, the CDS shall be deemed to be a creditor of the insolvent participant in respect of that net termination sum.

(3) The CDS may, notwithstanding any other enactment, realise assets of the insolvent or bankrupt participant pursuant to a pledge in favour of the CDS or pursuant to the rules of the CDS or guarantees established by the CDS in accordance with its rules.

Bankruptcy Provisions of Mauritius

(continued)

16. Non - application of the section 13 of the Companies Act

- (1) Subject to subsection (2), section 13 of the Companies Act, insofar as it provides that a transfer or contract of sale of shares or debentures in contravention of the section shall be void, shall not apply to any disposition of deposited securities.
- (2) The Court may, on being satisfied that a disposition of deposited securities would in the absence of subsection (1), be void, on the application of the Registrar of Companies or any person, order the transfer of the shares acquired in contravention of section 13 of the Companies Act.

Bankruptcy Provisions of Mauritius

(continued)

17. Charging or pledging of securities

- (1) Where a deposited security is charged or pledged by a depositor (in this section referred to as "chargor" or "pledgor") in favour of any person (in this section referred to as "chargee" or "pledgee"), the CDS or a participant, with or through whom the securities account of the depositor is maintained, shall on a request in writing made by the depositor, chargee or pledgee, as the case may be, transfer or cause to be transferred such security into the securities account of the chargee or pledgee, as the case may be, maintained for such purpose.
- (2) Where a request is made by a chargee or pledgee as provided under subsection (1), such request shall be supported by documents evidencing such charge or pledge in his favour.
- (3) The securities account maintained by the chargee or pledgee pursuant to subsection (1) shall be designated as the "Pledged Securities Account".

Bankruptcy Provisions of Mauritius

(continued)

(4) Where a charge or pledge over a deposited security has been discharged or released, the CDS or participant, as the case may be, shall, upon receipt of a notice in writing from the chargee or pledgee confirming the same, transfer the deposited security into the securities account of the chargor or pledgor.

(5) The provisions relating to the transfer or withdrawal of deposited securities shall apply, mutatis mutandis, to securities in the "Pledged Securities Account".

(6) Where a pledge of a security is effected in terms of subsection (1), the entries in the records of the CDS constitute-

- (a) the endorsement of the security for the purpose of Article 2076 of the Civil Code; and
- (b) registration of the pledge of the security in the records of the issuer for the purpose of Article 2077 of the Civil Code.

Bankruptcy Related Provisions

Proposed Article 1

- ◆ Where service agreement is entered into between MCSD and its participant at any time prior to the commencement of the declaration of bankruptcy of such participant
 - 1. notwithstanding the declaration of bankruptcy the agreement can be terminated by the MCSD at any time; (Article 605)
 - 2. notwithstanding the declaration of bankruptcy, the obligations between the parties thereto may be set off in accordance with its provisions; (Article 590 and 591)
 - 3. any net amount of money and securities resulting from the offset and owed by the broker is a claim provable in bankruptcy

Bankruptcy Related Provisions

Proposed Article 1 (continued)

- 4. cannot be refuted by the trustee or creditors in bankruptcy (Article 650)
- 5. the fulfillment of the obligations thereof cannot be rejected by the trustee (Article 650)
- 6. the right to a separate satisfaction by the enforcement of a claim or by a security interest in the broker's assets (Article 650)
 - a. are not annulled by any bankruptcy proceeding and remain enforceable
 - b. and proceeding for execution can be initiated or continued as though it was based on a legal transaction made by the trustee in bankruptcy. (Article 605)

Bankruptcy Related Provisions

Proposed Article 2

- ◆ Whereas customer property is in the custody or administration of the bankruptcy trustee, this property shall be protected from use by the trustee for any purposes including administration expenses, payment of taxes, or wages of the broker and instead shall be returned to the customer or the MCSD depending on whether MCSD has returned securities or moneys to the customer in accordance with the service agreement. (Articles 616 and 618)

Bankruptcy Related Provisions

Proposed Article 3

- ◆ Whereas in accordance with proposed article 1, no lawsuits shall be instituted by the Trustee against the MCSD to recover property or SGF to recover contributions. (Article 589)

Proposed article 4

- ◆ Whereas under no circumstances shall a broker or a trustee in bankruptcy operate a broker business once the broker is declared bankrupt. (Article 589)

Bankruptcy Related Provisions

Proposed Article 5

- ◆ Whereas MCSD in a bankruptcy proceeding shall be subrogated to the rights of the customer. (Article 650)